In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
Petitioner,

vs.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

The Petition of Deposit Guaranty National Bank (hereinafter "the bank") as originally filed sought review as to seven questions dealing with mootness, the substantive law of Mississippi, the status of national banks, and the certifiability of the action as a class action. This Court has granted the writ of certiorari only as to the mootness questions.

QUESTIONS PRESENTED FOR REVIEW

I.

May a defendant by his voluntary tender of individual damages to a named plaintiff thwart or evade appellate review of an erroneous refusal of class certification pursued by the plaintiff as class representative?

II.

Is the issue sought to be asserted by the named plaintiff on behalf of the class, after attempted deliberate mootness by the defendant of his individual claim, one which will evade review unless the correction of the erroneous refusal to certify can be said to relate back to either commencement of the action or the initial denial of the motion for certification.

III.

Does a named plaintiff to whom a tender has been made of the amount of his individual claim nonetheless maintain under the facts of this case a sufficient personal interest stake to prosecute an appeal of an erroneous refusal to certify a class.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS

Art. I, §8, U.S. Constitution:

> "The Congress shall have power . . . (t)o constitute tribunals inferior to the supreme court. . . ."

28 U.S.C. §1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The named plaintiffs (hereinafter, "the cardholders") first note the irrelevance of several segments of the bank's statement of the case which appear to be a transparent attempt to re-submit the numerous questions presented in its petition for certiorari which this Court has previously declined to consider.

At the time of the entry of the order by the District Court denying certification the cardholders sought to obtain review by interlocutory appeal. This effort was successfully resisted by the bank. The seven months' interval referred to at several places in the bank's brief embraced this activity.

The bank points to the absence of intervenors prior to the service and filing of its offer of judgment. This offer was made while the cardholders' motion for summary judgment was pending. Contrary to Rule 68, the bank's offer was filed with the court. The cardholders responded with a counter-offer of judgment which was served on the bank and a copy of which is attached as an addendum. The counter-offer expressly recognized the right to review the class-wide claim for relief. This offer was declined by the bank. This record of disinclination to protect the rights of the absent class member is wholly inconsistent with the bank's present concern over absence of intervenors.

The objection to the tender of the bank was made by the cardholders through their lawyers. The bank's statement that the lawyers, rather than the cardholders, lodged the objection is wholly unsupportable.

The statement that the cardholders received everything claimed in the complaint (Brief of Bank, p. 5) ignores the cardholders' representative claim. The contents of phraseology of the Notice of Appeal were never mentioned by the bank in the Court of Appeals.

There is no complete loss of all personal financial interest by the named plaintiffs. The cardholders have a continuing stake by reason of the prospect for spreading of expenses along with the prospect for recoupment of costs of notice which they have agreed to underwrite.

SUMMARY OF ARGUMENT

The cardholders have presented this Court with the requisite concrete adverseness in a form historically considered as capable of resolution through the judicial process. See, *Flast* v. *Cohen*, 392 U.S. 83 (1968), cert. denied, 393 U.S. 940.

The cardholders had standing at the commencement of this action and at the time of denial of certification. Prudential limitations on the exercise of federal jurisdiction do not apply to cardholders' statutory cause of action for money damages. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

This Court has already recognized cardholders' right to appeal in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978). The right to appeal is a logical by-product of this Court's refusal to permit interlocutory appeals of orders denying certification. See, e.g., *Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978).

Mootness presupposes a standing which existed at the outset but which is no longer present. The general rules governing mootness were first announced in cases not dealing with the issue in the context of a class action. These rules recognize mootness to exist only when the controversy can be said with assurance not to be expected reasonably to recur and, further, interim events have completely eradicated the effects of the violation. *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642, 649 (1979). An escape from mootness exists when the challenged action is capable of repetition yet evading review. *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911). Voluntary cessation of illegal conduct does not make a case moot. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). Mootness

exists only when all the issues in a proceeding are no longer live. *Powell* v. *McCormack*, 395 U.S. 436 (1969). The presence of an injury which is capable of repetition yet evading review may avoid mootness but it is not an essential ingredient of satisfaction of the Article III minima for a case or controversy. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

In the context of a class action, certain mootness rules have been announced by this Court in cases which are distinguishable because the right to class action treatment was not a litigated issue. These general rules governing mootness in the class action context recognize satisfaction of Article III minima when a named plaintiff's claim has become moot before the District Court can reasonably expect it to certify a class and, under such circumstances, the certification is deemed to relate back to the commencement of the action. *Sosna* v. *State of Iowa*, 419 U.S. 393 (1975). A certification of a class by a District Court is not treated by this Court as an accomplished fact and an improper certification will be set aside. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The cardholders have a federal statutory (28 U.S.C. §1291) right to review a final decision of a District Court of the United States and that review includes the right to seek review of a denial of a claim advanced in a representative capacity for class action treatment. The alleged mootness of the individual claims of the cardholders is but one of two issues advanced by the cardholders in this case and, consequently, the right to proceed as a class, a litigated issue subject to the right of appeal, remains a live claim in the case. Because of the restrictions on interlocutory appeals from denials of class certification (*Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 LEd. 2d 351 (1978)), any error of law by the trial court would go uncorrected if the case must be dismissed when a repre-

sentative's claim becomes moot after erroneous refusal to certify (*Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (5th Cir. 1978), vacating, 557 F. 2d 414 (5th Cir. 1977)).

In a context of an action for money damages where the defendant has tendered sums claimed by the named plaintiff after a refusal of certification and after the bar of the statute of limitations, it can be fairly said that the class-wide issue will evade review if mootness is found and, under such circumstances, the reversal of the class action determination by the Court of Appeals should be deemed to relate back to the time of the commencement of the action or the time of the entry of the erroneous order denying certification. The concept of the transitory nature of the cause of action, the historical context for relation back, should include the unavoidable lapse of time involved in the appellate review process where the so-called mooting event is nothing but the pay-off of part of a claim and evasion of review of the class-wide issue will otherwise result.

The cardholders have a personal interest stake in the controversy by reason of the prospect for spreading of generally non-taxable expense items and by reason of their status as fiduciary representatives of the class.

The public policy of the United States demands that the defendant be required to answer to the claims of the class. The gravamen of the cardholders' claim is violation of a federal statute, 12 U.S.C. §§85, 86. The bank's condemnation of Rule 23 is unfounded and misguided. *A. Miller, An Overview of Federal Class Actions; Past, Present and Future* (Federal Judicial Center, 1977). The utility of Rule 23 would be substantially eviscerated by an embrace of the mootness concept urged upon this Court by the bank. The prejudice to the putative class members is obvious when one considers the fact that if this case is moot, the statute of limitations will have run against

all of the claims of the class members (*American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974)) notwithstanding the fact that they have properly relied upon the prosecution of this appeal by the cardholders (*United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978)). The cardholders satisfy the requirement of having a "legally cognizable interest" in the final determination of the underlying questions of fact and law. *County of Los Angeles* v. *Davis, supra.*

The question of mootness in a class action context has been treated in the various circuits and only the Seventh and Ninth Circuits read the *Sosna* line of cases so as to require a class in fact certified at the appellate level (*Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978); *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (9th Cir. 1977)) as opposed to a class which is properly certifiable (*Geraghty* v. *U.S. Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978)) in order to satisfy Article III minima when confronted with the mootness of the named plaintiff's claim.

The judgment in all respects is due to be affirmed.

ARGUMENT

I.

The Policy Bases for Article III "Case or Controversy"

This Court has often noted that "the focus upon the plaintiff's stake in the outcome of the issue he seeks to have adjudicated serves a separate and equally important function bearing upon the nature of the judicial process." *Simon* v. *Eastern Kentucky Welfare Rights Organization,*

426 U.S. 26, 38, n. 16 (1976). A significant personal stake serves "to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). The questions must be presented "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 755 (1976); *Flast* v. *Cohen,* 392 U.S. 83 (1968).

The mere fact that adverse parties desire a decision on the merits does not compel this Court to respond on the merits as was stated in *Kremens* v. *Bartley,* 431 U.S. 119, 134, n. 15 (1977), a case involving an effort to resolve issues of constitutional law. However, in the instant case, the sole issue before this Court is mootness in the context of a charge of violation of a federal statute and, although the bank sees the case as moot, the cardholders continue to supply yet another level of the federal judicial system with what we respectfully submit constitutes the necessary "concrete adverseness" in opposition to the bank's view.

II.

The Cardholders Had Standing at Commencement of the Action and at the Denial of Certification

The cardholders claimed damages in their individual capacity for usurious interest charges in violation of 12 U.S.C. §§85, 86, the National Banking Act. The initial analysis must begin with their status at the time that they commenced an action claiming damages both as individuals and as members of a class. The threshold inquiry then deals with their standing at that time.

The constitutional limits on standing eliminate claims in which the plaintiffs have failed to make out a case

or controversy between themselves and the defendant. *Gladstone Realtors* v. *Village of Bellwood,* ..... U.S. ..... (April 7, 1979). The cardholders made a clear showing in their complaint that they personally had suffered actual damage as a result of illegal activity of the defendant. It is an indisputable fact that the strength of their allegations led to an offer of judgment by the bank, albeit without prejudice. A showing of injury as a result of illegal conduct by a defendant satisfies Article III of the Constitution. *Gladstone Realtors* v. *Village of Bellwood, supra; Duke Power Co.* v. *Carolina Environmental Study Group,* ..... U.S. ....., 98 S.Ct. 2620, 2630 (1978); *Arlington Heights* v. *Metropolitan Development Housing Corp.,* 429 U.S. 252, 260-261 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). A case or controversy thus clearly existed at the commencement of the action in 1972 and on September 29, 1975, the date upon which the District Court declined to certify a class. In fact, the bank has never challenged the cardholders' standing at these two critical points.

III.

Effect of Prudential Limitations on the Exercise of Federal Jurisdiction

Although this Court recognizes prudential limitations upon the exercise of federal judicial power, such restraint appears to be more appropriately applicable to cases in which a constitutional question of broad social import is tendered by a claimant having no greater injury than all or at least a large class of other citizens. *Gladstone Realtors, supra, Warth* v. *Seldin, supra* at 499. The instant action is grounded upon violation of a federal statute (12 U.S.C. §§85, 86) by a private party rather than constitutional rights and, in such an instance, the prudential limita-

tions that overlay Article III requirements have not been applied as an obstacle to the exercise of federal jurisdiction. See, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). We respectfully submit that the record clearly supports satisfaction of the Article III minima and that non-constitutional limitations on standing are inapplicable to the cardholders' claims.

IV.

This Court Has Already Resolved This Issue in Cardholders' Favor

Before any detailed analysis of mootness and class actions, we submit that this Court has already resolved the mootness issue in cardholders' favor. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978) the District Court refused to certify a class and there followed an agreement between the named plaintiffs and the defendant on their individual claims and a judgment of dismissal. The named plaintiffs did not appeal and a member of the class sought to intervene within the applicable time period for the taking of an appeal. Upon denial of intervention, the intervenor appealed and obtained permission to intervene as well as an order compelling the certification of a class. This Court held that the intervenor's application was timely filed.

The issue before this Court in *McDonald, supra*, was the timeliness of the application for intervention, the defendant taking the view that the time began to run at the denial of class certification and not at the time of the entry of final judgment. In commenting upon the status of the named plaintiffs, this Court observed that *while a denial of certification does strip a case of its character as a class action, it does not follow from such a proposition that the case must be treated as if there*

never had been an action brought on behalf of absent class members. United Airlines, Inc. v. *McDonald*, 432 U.S. 385, 393 (1977), reh. denied, 434 U.S. 989 (1978). Then, this Court made the very clear pronouncement:

> "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes." *McDonald, supra* at 393. *Accord, Gardner* v. *Westinghouse Broadcasting Co.*, ... U.S. ....., 57 L.Ed. 2d 364, 368 (1978).

The dissent in *McDonald, supra*, took issue with this statement contending that the concession of United recognized the plaintiff's right to appeal the denial of class status only if the plaintiffs had chosen to litigate the case to a final judgment rather than to settle it. *McDonald, supra* at 400.

The basis for refusal to permit interlocutory appeals of orders denying class certification of necessity proceeds on the premise that a named plaintiff can seek review of the denial of certification, even after a judgment in his favor. See the concurring opinion of Chief Judge Seitz in *Gardner* v. *Westinghouse Broadcasting Co.*, 559 F. 2d 209, 214 (3rd Cir. 1977), affirmed, ... U.S. ....., 98 S.Ct. 2451 (1978). See, also, *Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978).

The instant case presents the situation of a judgment based on a tender to the named plaintiffs without an embrace of the tender by them so that it can be fairly stated that the named plaintiffs have not "settled". Nonetheless, the named plaintiffs here have no less stake than the named plaintiffs in *McDonald* would have had if they had perfected the appeal which this Court expressly recognized that they could do. Thus, no basis exists for a different conclusion as to the named cardholders in the instant case.

V.

The Doctrine of Mootness

A. Introductory Note

Mootness has been aptly described as a time dimension of standing. 13 *C. Wright, J. Miller & E. Cooper, Federal Practice and Procedure*, §3533, p. 266 (1975). The bank's challenge is grounded upon an alleged mootness of the cardholders' individual claims after denial of class certification. The cardholders do not concede their lack of individual stake. However, the cardholders contend that this entire action is not mooted even if the assumption is made for argument's sake that the cardholders' individual claims became moot after the erroneous denial of certification. The description of the denial of certification as erroneous is based upon the Court of Appeals' characterization of this case as a "classic case for a Rule 23(b)(3) class action"[1] and the scope of this Court's order granting the petition for certiorari.[2] Analysis of the applicability of mootness to this case should begin with a statement of the rule in the context where it historically arose—in actions presenting no Article III problems solely on account of the action's status as a class action.

B. Mootness in Other Than a Class Action Context

The general rules governing mootness, independent of issues peculiar to class actions, were recently discussed by this Court in *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642 (1979), an action commenced as a class action. However, the mootness defect was there

1. Opinion below, App. p. 79.

2. The Court's review by certiorari has been limited to the mootness question. The petitioner's questions dealing with the Court of Appeals reversal of the certification order were not accepted for review.

found to permeate the entire class and was not peculiar to a disability of the class representative. In *Davis*, mootness was defined as follows:

> " 'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)." *Davis, supra* at 649.

A post-suit change of heart has never been an ample basis for a finding of mootness. To the contrary, this Court in *Davis* reiterated that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal power to hear and determine the case, *i.e.*, does not make the case moot." *Davis, supra* at 649; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). The general rule governing abatement of an action by mootness was stated in *Davis* as follows:

> "But jurisdiction, properly acquired, may abate if the case becomes moot because
>
> (1) it can be said with assurance that 'there is no reasonable expectation. . .' that the alleged violation will recur, see *id.* at 633, see also *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972), and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973).
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.
>
> The burden of demonstrating mootness 'is a heavy one.' " *Davis, supra* at 649.

An additional general rule in the area of mootness deserves mention. An avoidance of mootness has been recognized where action, particularly governmental, has been shown to be "capable of repetition, yet evading review." The rule stems from an action where there was a likelihood of recurring injury from short term orders of the Interstate Commerce Commission which would be issued in the future and would have a similar effect on the plaintiff (*Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911)) and, like other mootness rules, has its roots in claims for injunctive relief in other than a class action context.

Finally, where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969).

C. Mootness Problems Peculiar to Class Actions

General concepts of mootness have been brought to bear in class actions where a mootness challenge has been made by reason of an asserted difference in position of the representative and the members of the putative class. In the wake of the variety of class action mootness cases reaching this Court certain rules have evolved.

There must be a named plaintiff who satisfies Article III minima at commencement of the action and at the time of certification but the Article III requirement can be met by the existence of a class in controversy with the defendant although the claim of the class representative has become moot. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). The class must be "duly certified" before the *Sosna* rule comes into play. *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128 (1975). However, when a named plaintiff's claim by its very temporal nature will become moot before the District Court can reasonably be

expected to certify the class, there can still be an Article III case or controversy because the certification "relates back" to the commencement of the action. This is particularly appropriate where "otherwise the issue would evade review". *Sosna, supra* at 402, n. 11; *Swisher* v. *Brady*, ... U.S. ....., 57 L.Ed. 2d 705, 714, n. 11 (1978); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The District Court's certification of a class is not treated by this Court as an accomplished fact. *Kremens* v. *Bartley*, 431 U.S. 119, 130 (1977). An improper certification will be set aside. *Jacobs, supra; Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

The necessity for the presence of an injury which is "capable of repetition, yet evading review" is an aspect of prudential limitation on the exercise of federal judicial power in the realm of constitutional rights and is not an essential ingredient of every Article III case or controversy. In cases within federal jurisdiction which otherwise satisfy Article III minima but which do not involve such an issue, the *Sosna* rule of avoidance of mootness can nonetheless be applied. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); see, also, *Gladstone Realtors* v. *Village of Bellwood*, ... U.S. ..... (April 7, 1979).

VI.

The Distinguishing Difference Between the Instant Case and Other Class Action Mootness Cases

The rules governing mootness in class actions have all arisen in cases before this Court where the right to proceed as a class action was not a litigated issue in the case, separate and apart from the merits claims. Specifically, examples include *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (certification granted based upon a stipulation); *Gerstein* v. *Pugh*,

420 U.S. 103 (1975) (District Court certified the class and even though plaintiff's claims may have been moot at the time of certification, the certification related back to the time of the filing of the complaint, the fact of certification not at issue on appeal); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (District Court certified class action; no appellate issue raised in connection therewith); *Zebloki* v. *Redhale*, 434 U.S. 374 (1978) (District Court certified class, defendant failed to file a brief in opposition to certification, no appellate issue raised with regard to certification); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (no class ever certified, plaintiffs lacked standing at the time of the commencement of the action, appellate issue dealt with plaintiffs' right to relief); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128 (1975) (class improperly certified, decertification ordered on this Court's own motion); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) (District Court treated case as a class action but failed to certify, defect raised by this Court on its own motion on appeal); *Winestein* v. *Bradford*, 423 U.S. 147 (1975) (plaintiff lost in District Court on merits, class not certified, no apparent appellate issue as to denial of class certification); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) (class not certified, appeal dealt only with the merit of the plaintiff's claim); and *Kremens* v. *Bartley*, 431 U.S. 119 (1977) (class certified in the District Court, propriety of certification raised by this Court on its own motion).

The bank's attempt to read into these rules the absolute requirement of a properly certified class as a condition precedent to review of other issues therefore takes these cases well beyond their proper context because the right to proceed as a class was not before this Court as a live issue in any of the *Sosna* line of cases.

We note in passing that in *Ihrke* v. *Northern States Power Company*, 409 U.S. 815 (1972) this Court in a memorandum opinion granted certiorari and vacated the judgment of the Court of Appeals (459 F. 2d 566 (8th Cir. 1972)) with instructions to dismiss the case as moot. In *Ihrke* the mootness of the individual claims coupled with a denial of certification compelled this Court's conclusion of dismissal for mootness because the certification question, although a litigated issue in the case, had been resolved *against* the class by the Court of Appeals and the judgment had been, in that respect, affirmed. Of course, in the instant case, the Court of Appeals resolved the certification question *in favor of* the class and this Court's action on the bank's petition for certiorari was limited to issues other than the reversal of the refusal to certify.

While further discussion of *Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on petition for rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978) appears later, the following quotation from a law review article dealing with *Winokur* emphasizes the distinction between the instant case and the previous class action mootness cases:

> "In the *Sosna* line of cases, the named plaintiffs were appealing a single issue common to themselves and their represented class: the substantive merit of the litigation they had brought. In such cases, mooting of the individual claims would, under a strict justiciability standard, lead to the mooting of the class's claims. This situation is very different from the one in *Winokur*, where the court was faced with named plaintiffs appealing two issues: the mootness of their individual claims and the district court's denial of class certification. *Even if the mooting of the individual claims were upheld and the court prevented from exercising jurisdiction over the named plaintiffs and their*

represented class's substantive claims, the procedural issue of class certification would have remained. In light of the well-established rules that the mooting of one of a plaintiff's claims does not require the mooting of his other claims and that each claim must be tested for mootness individually, the class certification issue should not have been mooted by the mooting of the named plaintiff's 10b-5 claims. Its survival should have maintained appellate jurisdiction in the circuit court of appeals. Had the appellate court found the district court's denial of class certification improper, it could have remanded to the district court, ordering certification of the class and continuation of the suit limited to the merits of the class's claims." *Note, Winokur* v. *Bell Federal Savings & Loan Association: An Overly Restrictive Application of the Mootness Doctrine in a Class Action Setting,* 72 Northwestern L. Rev. 811, 816-17 (1978). Emphasis added.

Historically, where the mootness claim affected the merit of the entire claim presented in the case, an adverse ruling by a trial court determining the action to be moot was subject to appellate review. Put another way, a district court's determination of mootness did not oust the appellate court of jurisdiction. See, e.g., *Vun Cannon* v. *Breed,* 565 F. 2d 1096 (9th Cir. 1977). Any other rule would have disregarded the constitutional grant of authority to Congress to create tribunals inferior to this Court at Article I, §8, and the statutory response thereto at 28 U.S.C. §1291 in which appellate jurisdiction is vested in the United States Courts of Appeals for review of all final decisions of the district courts of the United States. This Court's previous cases dealing with mootness in class actions must therefore be evaluated in light of the federally created right to review a refusal of certification when it is a litigated issue in the case.

VII.

This Action Is Not Moot Because the Right to Class Certification Was a Litigated Issue in This Case and the Issue As to the Cardholders Would Evade Review If Mootness Is Found

A. Certification As a Litigated Issue

The bank's theory of mootness depends upon this Court's acceptance of the denial of the certification by the District Court as an *ipse dixit,* insulated from judicial review. Of course, such action would deprive the litigant of his federally created right to review a decision of a District Court of the United States as is set forth at 28 U.S.C. §1291.

This action was commenced by the cardholders on two claims. First, they sued the bank as individuals; second, they sued the bank as representatives of a class composed of other cardholders. The first claim to be treated by the District Court was the cardholders' representative claim and it was disposed of adversely to them by the District Court's denial of certification. Of course, this ruling occurred prior to any consideration of the claims of statutory violation on the merits. The bank then successfully opposed cardholders' attempt to obtain interlocutory review. Shortly after the refusal of the court of appeals to accept review of the interlocutory certification order, and while the cardholders' motion for summary judgment was pending, the bank tendered sums due to the named plaintiffs under the claims made in their individual capacity. A judgment was thereafter entered on this tender over the cardholders' objection. On appeal by the cardholders, the bank sought to have the case dismissed on the ground of mootness by the filing of a motion to dismiss the appeal.

As was expressed in the law review article quoted earlier, mootness is found only upon an analysis of *all* the issues presented in the case and "where one of the several issues becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969). Hence the bank's fact of mootness on appeal is based entirely upon the acceptance of the bank's contention on the litigated issue of class certification. This case presents the situation where, after an appropriate certification hearing the Court through no fault of the named plaintiffs, improperly denied certification. In addressing such a situation, the Fifth Circuit has stated in *Satterwhite* v. *City of Greenville*, 578 F. 2d 987, 995 (5th Cir. 1978), vacating, 557 F. 2d 414 (5th Cir. 1977) ". . . because of the restrictions on interlocutory appeals from class certification denials . . . (citations omitted), the error of law by the trial court will go uncorrected if the case is dismissed when the representatives' claim becomes moot." The recent decisions of this Court (*Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.*, ... U.S. ....., 57 L.Ed. 2d 364 (1978)) disallowing interlocutory review in class actions set the certification procedure in motion down the dead-end street of no judicial review if mootness is found to attach under these circumstances.

Obviously, the fact of a refusal to certify is critical to the bank's theory. The significance that this Court attaches to the mere fact of certification by a District Court was squarely addressed in *Kremens* v. *Bartley*, 431 U.S. 119, 130 (1977), where it was stated that "we have never adopted a flat rule that the mere fact of certification of a class by a District Court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become

moot." Prior to *Kremens*, this Court had taken action consistent with this principle in *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, *supra*, and *Baxter* v. *Palmigiano*, *supra*. Thus, only a "properly certified" class may succeed to the adversary position of a named representative whose claim becomes moot. *Jacobs*, *supra*. We consider it to be consistent with this reasoning to conclude that the mere fact of an erroneous denial of certification of a class by a District Court is not sufficient to require this Court to decline to decide the merits of the claims of the class who plaintiff has sought to represent. We respectfully submit that the result in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978), as previously mentioned, is simply a logical, although not expressly articulated, application of this view.

The cardholders' theory of avoidance of mootness by reliance upon the right to review a litigated issue removes this case from the direct influence of cases dealing specifically with satisfaction of Art. III minima in a class action context. The case is therefore governed by general mootness concepts. Under *Powell* v. *McCormack*, *supra*, as earlier argued, mootness must reach *all* claims. Here the bank's tender clearly is inadequate and a mootness would occur only upon the tender of all of the relief prayed for by the cardholders, both as individuals and as representatives of the class. The bank simply cannot, on this record, satisfy the second prong of the test of *County of Los Angeles* v. *Davis*, *supra*, that "interim relief or events have *completely* or irrevocably eradicated the effects of the alleged violation." Emphasis added.

The bank gamely tries to legitimate its tender of not half a loaf, but a crumb. Brief of Bank, pp. 20-23. The bank states that "no effort was made to prevent a ruling on the motion for class certification". Brief of Bank, p.

23. The bank's magnanimous recognition of the cardholders' right to a hearing in District Court leaves unstated the fact of the bank's vigorous opposition to cardholders' attempt to obtain interlocutory review and, now, review after judgment. The bank states that "there was nothing wrong about the tender". Brief of Bank, p. 22. We respectfully disagree. The tender was an incomplete offer of the relief prayed for in the complaint and, as such, was nothing more than mere gimmickry calculated to eviscerate Rule 23 and designed to obtain a construction thereof wholly inconsistent with the Rule 1 mandate for a construction sympathetic with the *just* determination of every action. Frankly, we consider such tactics in the defense of this action to fall precisely within the contours of the bad faith, vexatious, wanton or oppressive conduct referred to by this Court in *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975) and *Vaughan* v. *Atkinson*, 369 U.S. 529 (1962).

The cardholders' appeal is not moot but is a live controversy based upon the federally created right (28 U.S.C. §1291) to review an adverse decision of a District Court.

B. Evasion of Review

The bank in its brief recognizes that prior certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, so long as a live controversy remains as between members of the certified class and the defendant. Brief of Bank, p. 16. The bank thus pins its hopes on a literal reading of the following from *Sosna*:

> ". . . There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23,[11] but there must be a live controversy at the time this Court reviews the case." *Sosna, supra* at 402.

Speaking to this very observation, Judge Friendly observed in *Frost* v. *Weinberger*, 515 F. 2d 57, 64 (2d Cir. 1975), cert. denied, 424 U.S. 958, as follows:

> "But the apparent force of what was said there (in *Sosna*) in text is largely drained by footnote 11, which seems to read directly on this case."

Footnote 11 of *Sosna* permits certification to relate back where the transitory nature of the claim is such that "otherwise the issue would evade review." The seminal "capable of repetition, yet evading review" standard, born in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), has come to carry a modern connotation as a means to justify exercise of federal judicial power in the constitutional field when the injury complained of can be so described. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

The exclusion of the phrase "capable of repetition" from footnote 11 is significant because it implies that the applicability of the standard in certain contexts may not depend entirely on the presence of a recurrent fact pattern but upon the likelihood of preclusion of judicial review of allegedly illegal conduct. In an action such as in the instant case, a claim for money damages rather than for injunctive relief, the "capable of repetition" feature of the old *Southern Pacific Terminal Company* test seems less relevant.

Here, the bank has the burden of showing mootness. *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642 (1979). Of course, a self-serving statement of disinclination to charge usurious interest in the future, while not presently in the record, could easily be made in an

effort to defeat applicability of the "capable of repetition" aspect of the doctrine by which mootness is avoided. However, that overlooks the real question of whether the class-wide issue will evade review if mootness is found, thereby enabling the bank to keep its windfall. The plain answer is that there would be no possibility of class-wide relief if the case has been moot as to the class since June of 1976, as the bank contends, because the statute of limitations may well have long since run under the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974).[3]

Class members who have relied on the named cardholders' pursuit of their rights could nonetheless be foreclosed from any relief, notwithstanding the fact this Court has already recognized the right of a class member to rely on the named plaintiff to appeal the class issues in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977), reh. denied, 434 U.S. 989 (1978). If the certification is not permitted to "relate back" no clearer case can be made out for applicability of the footnote 11 standard—"the reality of the claim that otherwise the issue would evade review." Consequently, the import of footnote 11 in *Sosna* should apply when the controversy becomes moot as to the named plaintiffs before the appellate court can reasonably be expected to rule on an appeal from an erroneous order denying a certification motion. The conclusion is even more warranted where, as here, the asserted mooting is nothing more than a payoff only of the representative in an action claiming class-wide money damages, rather than injunctive relief. The applicability of the test of issue evasion in deliberate mootness problems has been suggested in 13 *C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure*, §3533, p. 171 (1978 pocket part).

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3. These actions are governed by a statute of limitations of two years. 12 U.S.C. §86.

VIII.

The Effect of Public Policy Upon the Questions Presented

The bank, with little effort to disguise its contempt for a duly promulgated rule of this Court, seeks to minimize the effect of the public interest at stake in this proceeding. The bank argues that there is "no significant public interest involved". Brief of Bank, p. 28. We first point out that we consider the charge of a violation of federal statutes (12 U.S.C. §§85, 86) condemning usurious charges by national banks to be a matter which ought not be dismissed with such levity. The very statute made the gravamen of the cardholders' claims was recently before this Court in *Marquette National Bank* v. *First of Omaha Corporation*, ... U.S. ....., 58 L.Ed. 2d 534, 541 (1978) and, on that occasion, this Court stated that a national bank is "an instrumentality of the Federal government, created for a public purpose, and as such (is) necessarily subject to the paramount authority of the United States." Consequently, the bank's argument that this litigation has no quasi-public or public overtone and is "purely commercial" is without foundation. The bank's rash characterizations with reference to alleged solicitation and attorneys as real parties in interest are merely "smokescreens" to shift attention from the fact that a national bank, an instrumentality of the Federal government, has been charged with the extraction of interest at a usurious rate in violation of express federal public policy.

The bank makes repeated statements as to the absence of "federal social policy", a lack of "great social reform issues of the day" or "circumstances . . . serv(ing) as a temptation to broaden the traditional concept of a "case or controversy" (Brief of Bank, page 10). These observations are generally applicable to cases of constitutional dimension and are perhaps best met by agreeing

with the bank that the cause of action made the basis of the cardholders' complaint is not grounded upon the violation of a federal constitutional provision. In that respect, the bank's position can then be said to support cardholders' contention that Art. III minima are well satisfied under all of the circumstances of this case because, as has been earlier discussed, additional requirements, not rooted upon considerations of a "case or controversy", may be applicable in order to avoid dismissal where the named plaintiffs' cause of action is grounded upon a violation of a federal constitutional right. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

The bank's disdain for Rule 23 permeates its brief. Judge Medina's allegorical reference to the "green bay tree" as appears on page 12 of the bank's brief is a reference to which the cardholders have been previously treated in earlier stages of this proceeding. The controversy over Rule 23 and the changing role of the federal district judge was directly addressed by Professor Miller in *A. Miller, An Overview of Federal Class Actions; Past, Present and Future* (Federal Judicial Center, 1977) (hereafter "the *Miller Study*"). The *Miller Study* at pages 2 through 12 argues forcefully that many of the changes which opponents of Rule 23 would like to blame upon the 1966 amendment to the rule are in fact changes that would have occurred had Rule 23 not been amended at all. Professor Miller notes:

> "In some respects it (Rule 23) has become a political figure, for example, in the consumer and environmental areas, and some aspects of the rule have received public notoriety in many parts of the United States because of media attention. Unfortunately, much of the discussion has been highly emotional and considerable snake-oil has been sold along the way." *Miller Study*, page 2.

Continuing, Professor Miller makes the further observation which is particularly applicable to the bank's position:

> "That amendment (Rule 23) has become a very convenient scapegoat for those distressed with the character and direction of class action litigation today, particularly those who must defend them . . . but I believe that the federal courts would find themselves in exactly the same position they now are in with regard to class actions had Rule 23 not been touched in 1966." *Miller Study*, page 4.

Professor Miller then points out that while *Brown* v. *Board of Education*, 347 U.S. 483 (1954) had been decided in 1954, the Civil Rights Acts of 1964 and 1965 had not been promulgated at the time the revised rule was drafted and Title 7 did not even exist. Professor Miller considers Rule 23 not to be responsible for the tremendous substantive law changes in the antitrust and securities field facilitating private actions but rather attributes this activity to Supreme Court and Court of Appeals decisions which have recognized new rights in these areas which then lead to class actions. *Miller Study*, p. 7. Only the shift from "opt in" to "opt out" is recognized as having made the representative action a more effective litigation tool for plaintiffs. *Miller Study*, p. 7.

Speaking to a situation comparable to that presented by the statutory action made the basis of the instant case, Professor Miller states that "cases brought under new statutes like Truth in Lending (15 U.S.C. §1601, et seq.) or the Fair Credit Reporting Acts (15 U.S.C. §1681, et seq.) which appear to have been enacted without the class action in mind . . . could have been brought under the 1938 text of Rule 23." *Miller Study*, p. 7. In summary, the study concludes:

> "What has happened is a function of forces set in motion by Congress, the Supreme Court, the Courts of

Appeals, social changes, and the legal profession." *Miller Study*, p. 9.

With this background, we respectfully submit that the bank's dissatisfaction with Rule 23 could more properly be laid at the doorstep of the bank's dissatisfaction with the forces of progress and change which have inevitably accompanied the advent of the latter half of the twentieth century.

A fair assessment of the true import of Rule 23 may well supply the appropriate reference for consideration of the effect of the public interest on the instant case. The wholesome aspects of Federal Rule 23 have been rather succinctly summarized as follows in *Satterwhite* v. *City of Greenville*, 578 F. 2d 987, 998 (5th Cir. 1978):

> "Class actions economize time and effort and prevent a multiplicity of suits, Advisory Committee's Note to Amended Rule 23, 1966, 39 F.R.D. 98, 102; deter mass wrong and fraud, *Parham* v. *Southwestern Bell Tel. Co.*, 8 Cir. 1970, 433 F. 2d 421, 428; preserve the constitutional rights of broad classes of persons, *Jones* v. *Diamond*, 5 Cir. 1975, 519 F. 2d 1090, 1097; provide a forum for the small claimant and the uninformed, *American Pipe & Constr. Co.* v. *Utah, supra*, 414 U.S. at 551-552, 94 S.Ct. at 765; *Samuel* v. *University of Pittsburgh*, 3 Cir. 1976, 538 F. 2d 991, 997; protect the rights of those reluctant to file individual actions against defendants with whom they have continuing necessary relationships, *Haynes* v. *Logan Furniture Mart, Inc.*, 7 Cir. 1974, 503 F. 2d 1161, 1164-1165; *Ste. Marie* v. *Eastern R. R. Ass'n*, S.D.N.Y. 1976, 72 F.R.D. 443, 449; and enhance judicial focus on broader public policy issues abstracted from individual factual idiosyncracies, *Watson* v. *Branch County Bank*, W.D. Mich. 1974, 380 F.Supp. 945, 957; rev'd on other grounds, 6

> Cir. 1975, 516 F. 2d 902. They are an essential part of the judicial arsenal for combatting racial and sexual discrimination. *Johnson* v. *Ga. Highway Express, Inc., supra; Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F. 2d 211, and, for this reason, the courts will respond with flexibility to such claims."

The utility of Rule 23 would be substantially eviscerated by an embrace of the mootness concept urged upon this Court by the bank. It would make possible deliberate evasion of review by capitulation to any individual bold enough to appear as a representative.

As a corollary to the restraints upon the exercise of federal jurisdiction in the form of prudential limitations, policy considerations which go to the heart of operation of a judicial system may compel a refusal to countenance an ouster of jurisdiction in certain instances. As commentators have observed, many class actions are motivated and supported by forces far larger than the immediate interest of the representative plaintiff. Requiring a deliberate search for a new representative would tend to aggravate the occasional unseemly process of recruiting representatives as it now stands. The test should be one of continued effective representation. So long as the named representative continues to satisfy the court that the suit is being pursued with full adversary vigor on behalf of non-mooted class claims, no further requirement should be imposed. See, generally, 13 *Wright, Miller & Cooper, Federal Practice and Procedure*, §3533, p. 291 (1975). As earlier noted, the named plaintiffs here clearly had standing at the outset and were sufficiently motivated to challenge the action of the bank. The desire to see that all receive the relief that has been tendered piecemeal to them well justifies their position on behalf of the absent class member.

The same commentators have also opined:

> "There are ample reasons for concern with class action litigation in which named representatives play no role larger than that of brave volunteers. These concerns however seem awkwardly implemented in the presently announced mootness doctrine." 13 *Wright, Miller & Cooper, Federal Practice and Procedure*, §3533 (1978 pocket part, p. 172).

The argument has been made that the prudential limitation upon exercise of federal jurisdiction, the fact of the particular case being an injury capable of repetition yet evading review, can be adapted to problems arising from deliberate mootness. See 13 *C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure*, §3533, p. 171 (1978 pocket part). Thus, it is there suggested that the court's mootness test related to injury capable of repetition yet evading review could be manipulated to find a continual evasion of review in the possibility or demonstrated fact of deliberate conduct designed to avoid review.

As has been earlier argued in connection with part VII B, when an issue evades review, particularly in a money damage claim not having constitutional overtones, the doctrine of footnote 11 of *Sosna, supra* at 402, easily applies to the bank's mootness contention in the case at bar.

The tactic at bar was rebuffed in *LaSala* v. *American Savings and Loan Association*, 5 Cal. 3d 864, 873, 489 P. 2d 1113, 1118 (1971) as follows:

> "If other borrowers bring a class action, [defendant] may again waive as to those representative borrowers, and again move to dismiss the action. Such a procedure could be followed ad infinitum for each successive

> group of representative plaintiffs. If defendant is permitted to succeed with such revolving door tactics, only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court."

Any other construction would compel piecemeal invasion of intervenors, thereby running counter to the grain of the public policy considerations in favor of avoidance of multiplicity of actions. Of course, the bank has already rejected cardholders' counter offer of judgment which would have expressly preserved the right to class-wide review. It cannot be stated with absolute certainty whether the bank would have paid off any intervenors as they appeared. However, the bank's concerted efforts to avoid class-wide review clearly set the stage for the multiplicity of action the rule seeks to eliminate. We can only assume that the bank was back-stopping its gambit with the prospect of imposition of ethical sanctions on plaintiffs' counsel should the price of the bank's "traditional right to buy peace" suddenly get out of hand. Clearly, the bank's conduct under these circumstances demonstrates the error of emphasis upon the role of intervenors.[4]

Perhaps the most succinct attack on the result urged upon this Court by the bank appears in the dissent of Judge Swygert in *Winokur* v. *Bell Federal Savings and*

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4. The "technical expedient of voluntarily granting the requested relief piecemeal to one named plaintiff after another" has been recognized as a source of obstruction of the rights of a large and genuine class. See *Heumann* v. *Board of Education*, 360 F. Supp. 623, 624 (S.D.N.Y. 1970); *Bledsoe, Mootness and Standing in Class Actions*, 1 Fla. S. Univ. L. Rev. 430 (1973).

Loan Association, on petition for rehearing, 562 F. 2d 1034 (7th Cir. 1977). The dissent states as follows:

> "I am unable to subscribe to a rule which insulates from an appellate review a decision denying class certification solely because a defendant tenders a few dollars to a putative class representative.
>
> * * *
>
> The unfortunate consequences of the rule formulated in this decision on future consumer class actions are plain: Defendants in such actions are now given the arbitrary power to bar appellate review by simply tendering the damages claims to the putative class representative. Rather than to go to trial and face the potential payment of damages which might be assessed in a class suit, defendants will pay off the named plaintiff or plaintiffs, thereby mooting the entire case. I think justice dictates that the right to judicial review should not be denied under the circumstances."

Even the Seventh Circuit has retreated from its holding in *Winokur, supra*, by withholding the availability of the mootness defense in a context when a motion for class certification has been pursued with reasonable diligence and is then pending before the Court. See *Susmann* v. *Lincoln American Corporation*, 587 F. 2d 866 (7th Cir. 1978). But, this result has given the District Court the authority to deny certification, in its discretion, with a certain knowledge that in most cases the docket will soon be cleared of the class action controversy by reason of the likelihood of defendant's tender to the named plaintiffs of individual damage claims. We respectfully submit that the result approved in *Susmann, supra*, continues to pose a potentiality for abuse which is a genuine threat to the future efficacy of Rule 23 actions.

IX.

The Cardholders Have a Personal Interest Stake

The cardholders have repeatedly argued ever since the issue of mootness was first raised by the bank in the Court of Appeals, that they do in fact maintain a personal interest in the controversy by reason of the prospect for the spreading of the expenses generally non-taxable as cost items which have already been incurred and which may well exceed the full amount of the individual claim of each plaintiff. In addition, the provision for the assumption of liability for the expenditure of costs which is mentioned in the opinion below at App. p. 78 continues to give the named plaintiffs a further viable personal interest in the case independent of their status as class champions. It is undisputed that the sums tendered by the named plaintiffs have remained in the district court ever since the date of payment by the bank, thus giving the named plaintiffs an element of adversity that did not even exist in *United Airlines, Inc.* v. *McDonald, supra.*

The bank has commented on the phraseology of the notice of appeal as having been taken on behalf of the named plaintiffs as class representatives but no challenge to the notice of appeal was raised at any time in these proceedings until the bank reached this Court. The bank has continuously been aware of the named plaintiffs' personal stake in the controversy which arises from their role as class champions. The named plaintiffs have lent their names to this cause and we respectfully submit that there is a right to pursue it to a more savory conclusion than a coerced payoff of their individual claims. The personal interest of a named plaintiff arising from the fact that he is a fiduciary was recognized by Chief Judge Seitz in his concurring opinion in *Gardner* v. *Westinghouse Broadcasting Co.*, 559 F. 2d 209, 214 (3rd Cir. 1977), affirmed, ... U.S. ....., 98 S.Ct. 2451 (1978).

X.

The Opinion Below

The bank expresses disapproval of the opinion below to the extent that it suggests a duty upon the named plaintiff who has lost a certification motion to pursue the right to a certification by an appeal. In the instant case, the named plaintiffs took an appeal and whether they did so motivated by belief as to their right to do so or by response to a duty to do so would have no bearing upon the result in the instant case. It can thus be said that the outcome of the instant case is in no-wise affected by the merit or lack of merit of the Fifth Circuit's statements as to the duty of the named plaintiff to prosecute the appeal.

The bank's argument having to do with the alleged absence of prejudice to putative class members challenges the Fifth Circuit's reference to its "special responsibilities" to insure that a dismissal "does not prejudice putative members". Brief of Bank, p. 32. Of course, while the dismissal was without prejudice to the putative members as the bank is at pains to point out, such an argument completely overlooks the barrier of the statute of limitations of two years[5] which, based upon the bank's attitude thus far, can be safely anticipated as a defense to any putative class member's claim.

The bank quibbles with the use of the term "nexus" and is puzzled over a possible explanation. In *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642, 649 (1979) this Court equated mootness with the absence of a "legally cognizable interest in the final determination of the underlying questions of fact and law." On this record, either upon the theory that the question would evade review if mootness were recognized or on the concept

5. 12 U.S.C. §86.

that a litigant has a federally protected statutory right to review a final decision adverse to him in a United States District Court or upon recognition of the named plaintiffs' personal interest stake, it can be said that the cardholders have a legally cognizable interest in the final determination of the underlying questions of fact and law. To paraphrase the philosopher Descartes, the bank's position well demonstrates a common fallacy attributed to dialecticians who prescribe certain rigid formulae of argument which lead to a conclusion with such necessity that the form rather than the content of the argument lulls reason into acceptance. Fortunately, the truth often breaks out of this prison of circuitous logic while the proponent remains entangled in the web in which he sought to capture the truth. So it is with the bank.

XI.

Summary of the Courts of Appeals' Treatment of Mootness When No Class Has Been Certified

The issue at bar has been touched on both directly and indirectly in cases presenting the situation of an asserted mootness coupled with a refusal to certify a class or simply a failure to act upon class claims prior to dismissal. In these cases the mootness can arise from either a voluntary act of the defendant, the inevitable result of the passage of time or victory on the merits. Closely related but not totally parallel are cases such as *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Satterwhite* v. *City of Greenville*, 549 F. 2d 347, vacated on rehearing, 557 F. 2d 414, on rehearing en banc, 578 F. 2d 987 (5th Cir. 1978) and *Goodman* v. *Schlesinger*, 584 F. 2d 1325 (4th Cir. 1978) where the named plaintiff was found never to have had standing as a member of the class at the commencement of the action. A sampling of the results from these possible fact patterns is summarized in the ensuing paragraphs.

A. Failure to Act Upon Certification - Mootness Found

1. Failure to Act - Mootness by Voluntary Act

The Second Circuit has found mootness where the action seeking declaratory and injunctive relief was dismissed in the District Court without a ruling on certification after the named plaintiffs had received the relief claimed in their complaint. See, *Boyd* v. *Justices of Special Term, Part I, of the Supreme Court of the State of New York, Bronx County,* 546 F. 2d 526 (2d Cir. 1976). Relation back was withheld on the ground that the action was not so transitory that mootness would inevitably intervene.

The Eighth Circuit has found mootness where the District Court dismissed a class action after a tender of relief and before a hearing on certification. See *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F. 2d 626 (8th Cir. 1975). The deliberate conduct of the defendant was seen as a fact militating against mootness since the issue as to the class continued to evade review. However, substantial changes in the substantive law necessitated broad amendments to the complaint on remand. Thus it could be said that the issue as to the class was so changed that there no longer existed the reality of the claim that otherwise the issue would evade review. *Bradley, supra* at 629.

2. Failure to Act - Mootness by Inevitable Result of the Passage of Time

The Ninth Circuit has found an action moot where the plaintiff had been released from custody prior to certification of a class of persons in custody whom plaintiff sought to represent. See *Vun Cannon* v. *Breed,* 565 F. 2d 1096 (9th Cir. 1977).

3. Failure to Act - Mootness by Victory on the Merits

The Ninth Circuit has found mootness where the plaintiffs obtained an administrative victory on the merits before certification. See *Kuahulu* v. *Employers Insurance of Wausau,* 557 F. 2d 1334 (9th Cir. 1977).

4. Summary

The two cases where mootness prior to certification was based upon a voluntary act are not grounded upon a reading of *Sosna* which would require, as an iron-clad condition precedent, the fact of a class certification as a prerequisite to continued satisfaction of Art. III minima. Both these cases recognized that in certain circumstances a relation back was possible.

The Ninth Circuit's view in *Vun Cannon* v. *Breed, supra,* construes *Sosna,* erroneously we submit, so as to require certification as an absolute prerequisite to appellate review. Interestingly, *Vun Cannon* v. *Breed, supra,* had been dismissed in the District Court for a "lack of standing". Actually, standing had existed at the commencement of the action and the plaintiff's release from custody had brought on mootness. Of course, the District Court's proclamation of a lack of standing was not viewed as an impediment to appellate jurisdiction since standing was a litigated issue in the case. Finally, *Kuahulu* v. *Employers Insurance of Wausau, supra,* interprets *Sosna* in a manner similar to that found in *Vun Cannon* v. *Breed, supra.*

B. Failure to Act Upon Certification - Mootness Not Found

1. Failure to Act - No Mootness by Voluntary Act

The Sixth Circuit refused to find mootness where the named plaintiff prayed for relief for herself and for others

similarly situated and the District Court dismissed the entire action by reason of a tender of relief to the named plaintiff before a certification hearing. See *Weathers* v. *Peters Realty Corporation*, 499 F. 2d 1197 (6th Cir. 1974). The Sixth Circuit reversed a contrary District Court holding stating that mootness of the named plaintiffs' personal claims would not foreclose a representative claim and that any other result would "thwart the purpose" of the litigation. *Weathers, supra* at 1201.

The Seventh Circuit has declined to find mootness under circumstances where the voluntary act occurred prior to the ruling upon a motion for certification regardless of whether the nature of the action is a claim "capable of repetition, yet evading review". See *Susmann* v. *Lincoln American*, 587 F. 2d 866 (7th Cir. 1978). Of course, where the claim is "capable of repetition, yet evading review", mootness will not follow when a voluntary act of the defendant has taken place while certification is pending. *DeBrown* v. *Trainor*, ... F. 2d ..... (7th Cir. April 3, 1979).

2. Failure to Act - No Mootness by Inevitable Result of the Passage of Time

The Second Circuit has refused to find mootness in reliance upon *Sosna, supra* at 402, n. 11, for the conclusion that Art. III minima continued to be satisfied when it could be said that the mootness of the named plaintiffs' individual claim would occur before the District Court could be reasonably expected to rule on the question of certification, thus permitting the doctrine of relation back to apply. See *Jones* v. *Califano*, 576 F. 2d 12 (2d Cir. 1978); *White* v. *Mathews*, 559 F. 2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908.

3. Failure to Act - No Mootness by Victory on the Merits

The Second Circuit has refused to find mootness where the plaintiff received the relief prayed for by administrative action prior to certification. See *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975). The relation back concept of *Sosna* was said to have been clearly applicable and the District Court certification of a class after the administrative action in favor of the named plaintiff was therefore entirely proper.

4. Summary

The Second Circuit cases (*White* v. *Mathews, supra* and *Jones* v. *Califano, supra*, and *Frost* v. *Weinberger, supra*), all justify a determination of the absence of mootness upon the basis that the doctrine of relation back announced in *Sosna* should prevent the mootness of the representative claims. The Seventh Circuit's opinion in *Susmann*, we respectfully submit, is evidence of the first step in a necessary retreat from its opinion in *Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). *Weathers* v. *Peters Realty Corporation, supra*, proceeds on the more fundamental basis that the named plaintiffs' representative claim was one of the litigated issues in the case and was therefore the proper subject of appellate review.

C. Denial of Certification - Mootness Found

1. Denial - Mootness by a Voluntary Act

The Seventh Circuit has found mootness to exist where the named plaintiff has unsuccessfully sought certification and the defendant has subsequently tendered to the named plaintiff the amount of his individual claim. See *Winokur* v. *Bell Federal Savings & Loan Association*, 560 F. 2d 271

(7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).[6]

2. Denial - Mootness by Inevitable Result of the Passage of Time

The Second Circuit found mootness where all the named inmates in an action commenced as a class action had been released from custody at the time of a hearing on a contempt proceeding brought on by the inmates. See *Lasky* v. *Quinlan,* 558 F. 2d 1133 (2d Cir. 1977).

3. Denial - Mootness by Victory on the Merits

No substantial question exists as to the absence of mootness in the context where certification has been declined and the plaintiff has prevailed on the merits because, even in the view of the dissent in *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978), this Court clearly recognized the right of the named plaintiff to review an adverse class determination after the named plaintiff has pursued the case to judgment. Only *Winokur* v. *Bell Federal Savings & Loan Association, supra,* stands for the proposition that the *Sosna* rationale requires a class certification as a condition precedent to the avoidance of mootness.

The finding of mootness in *Lasky* v. *Quinlan, supra,* is not buttressed by such a rigid interpretation of *Sosna.* In *Lasky* the action had been denied class certification prior to the entry of the order made the subject of the contempt proceedings. In vacating the contempt citation on the ground of mootness, the Second Circuit recognized the *Sosna* endorsement of the applicability of the doctrine of

6. Some bases for denial of certiorari independent of the merits of the questions presented were advanced by the Respondent in *Winokur* and are set forth in the Cardholders' Brief as Opposition to Petitioner for Certiorari, pp. 4-5.

relation back to certification questions but noted that "such an argument is unavailable where, as here, the District Court expressly denied class certification *and there was no appeal from that determination.*" *Lasky* v. *Quinlan, supra* at 1136. Emphasis added. Consequently, *Lasky* appears to recognize the concept of the absence of mootness when the denial of certification is a litigated issue in the case.

D. Denial of Certification - Mootness Not Found

1. Denial - No Mootness by Voluntary Act

The Fifth Circuit's decision in *Roper* v. *Consurve,* 578 F. 2d 1106 (5th Cir. 1978), the case at bar, properly falls under this category.

A decertification occurring after the tender of individual damage claims of the named plaintiffs was reversed by the Ninth Circuit in *Cameron* v. *E. M. Adams & Co.,* 547 F. 2d 473 (9th Cir. 1976). The reversal of decertification was said to relate back to the date of the erroneous order of decertification, thus placing the named plaintiffs in the position they had occupied on that date. A similar result is reached in *Williams* v. *Sinclair,* 529 F. 2d 1383 (9th Cir. 1975), cert. denied, 426 U.S. 936.

2. Denial - No Mootness by Inevitable Result of the Passage of Time

The Third Circuit had declined to find mootness where a federal prisoner challenging parole guidelines served his sentence and was released during the pendency of the action. See *Geraghty* v. *U.S. Parole Commission,* 579 F. 2d 238 (3rd Cir. 1978).

3. Denial - No Mootness by Victory on the Merits

The Tenth Circuit has permitted a relation back of a reversal of the denial of certification after an appeal by

the named plaintiffs after their having prevailed on the merits. *Esplin* v. *Hirschi,* 402 F. 2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969). In *Esplin* the defendant had appealed and the named plaintiffs obtained review of the refusal to certify by cross-appeal. Such result would appear to be mandated by the subsequent case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978). See also *Gelman* v. *Westinghouse Electric Corporation,* 556 F. 2d 699 (3rd Cir. 1977).

4. Summary

The construction placed upon the *Sosna* line of cases by the Third Circuit in *Geraghty* matches the views advanced herein by the cardholders with respect to the correct interpretation of *Sosna.* In *Geraghty,* the Third Circuit extensively reviewed the *Sosna* line of cases and construed them to require a properly *certifiable* class rather than a class which has in fact been properly certified by the time it reached this Court. *Geraghty, supra* at 249, n. 43.

The recognition of the bifurcated nature of a class plaintiff's claim in his individual capacity as well as in his representative capacity is clearly recognized in *Cameron* v. *E. M. Adams & Co., supra,* where the Ninth Circuit stated that "the post-decertification tender by the defendants to the named plaintiffs cannot satisfy their claims as members of a class." *Cameron, supra* at 478.

E. Conclusion As to Circuit Treatment

Upon a review of the trends in the circuits, the views of the Ninth Circuit as enunciated in *Vun Cannon* v. *Breed, supra,* and the Seventh Circuit as stated in *Winokur* v. *Bell Savings and Loan Association,* appear to be the only two circuits which are presently wedded to a rigid interpretation of *Sosna* so as to require a live controversy

between the named plaintiff and the defendant or a class in fact certified and the defendant at *all* times. Of course, this view disregards the recognition of the availability of the concept of relation back as appears in *Sosna,* 419 U.S. 393, 402, n. 11 (1975). See the discussion of footnote 11 of *Sosna* in *Frost* v. *Weinberger,* 515 F. 2d 57, 64 (2d Cir. 1975), cert. denied, 424 U.S. 958.

Each of the other cases treated in this portion of the brief in which mootness was found to exist contains special facts or circumstances which made application of the doctrine of relation back inappropriate. Finally, the absence of mootness simply because of the right of the named plaintiff in his representative capacity to review the adversely determined representative claim is recognized in *Weathers* v. *Peters Realty Corporation, supra; Lasky* v. *Quinlan, supra;* and *Cameron* v. *E. M. Adams Co., supra.*

CONCLUSION

This Court has heretofore solidly embraced the rule that jurisdiction in the constitutional sense will not be lost simply because the named plaintiffs' claim has become moot. This Court has also recognized the applicability of the doctrine of relation back to orders of certification.

The putative class can supply the requisite adversity to the defendant's position where the class is properly *certifiable,* the class representative has obtained a reversal of an erroneous District Court order refusing certification, and the doctrine of relation back is properly available. Relation back, heretofore applicable to temporal causes of action primarily for injunctive relief, should be available to permit reversal of an erroneous refusal to certify to relate back where otherwise the issue sought to be advanced on behalf of the class will evade review. A con-

trary result would contravene the public policy against proliferation of litigation and would sharply limit the utility of Rule 23.

The cardholders respectfully submit that the judgment of the Court of Appeals is due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Respondents on Vardaman S. Dunn, Esq. and William F. Goodman, Jr., Esq., by depositing same in the United States Mail, postage prepaid and addressed to their respective mailing addresses.

This 6th day of June, 1979.

CHAMP LYONS, JR.
Of Counsel

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

CIVIL ACTION NO. 4261 (N)

ROBERT L. ROPER and JACK HUDGINS, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

CONSURVE, INC., d/b/a BankAmericard Center and DEPOSIT GUARANTY NATIONAL BANK,
Jackson, Mississippi,
Defendants.

COUNTER-OFFER OF JUDGMENT

The plaintiffs, in response to the Offer of Judgment heretofore filed by the defendants on June 1, 1976, do herewith counter-offer to the defendants and for said counter-offer, plaintiffs agree to the entry of a judgment for the amounts claimed as set forth in paragraphs 2 and 3 of the defendants' offer, subject, nonetheless, to the express conditions (1), that plaintiffs do not in any way admit the non-liability of the defendants, (2), that the plaintiffs expressly reserve the right to maintain this action as a class action, and (3) that this counter-offer is made without prejudice to the right of the plaintiffs to seek review of the ruling of this Court on the issue of the maintainability of this action as a class action, upon the

entry of any final judgment based upon defendant's acceptance of this counter-offer.

.....

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ..... day of June, 1976, served a copy of the foregoing Counter-Offer of Judgment on Mr. Vardaman S. Dunn, P. O. Box 1046, Jackson, Mississippi, by hand.

.....